

UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF NEW YORK

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DAWN SMITH and WILFREDO ORTIZ,  
individually and on behalf of all others similarly  
situated,

Civil Action No. 6:18-cv-6784 (MAT)

Plaintiffs,

v.

SUMMIT RETAIL SOLUTIONS, INC.

Defendant.

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**ORDER OF DISMISSAL WITHOUT PREJUDICE**

WHEREAS, Plaintiffs Dawn Smith and Wilfredo Ortiz commenced this action on October 9, 2018 by filing their complaint in New York State Supreme Court, County of Monroe, in an action entitled Dawn Smith and Wilfred Ortiz Ruiz, individually and on behalf of all others similarly situated v. Summit Retail Solutions, Inc., Index No. E2018008080 (S.Ct. Monroe) alleging violations of the Fair Labor Standards Act, 29 U.S.C. §216(b), and New York Labor Law §190 et seq. and §650 et seq.; and

WHEREAS, after service of the complaint, Defendant Summit Retail Solutions timely removed this action to this court on October 31, 2018, Dawn Smith and Wilfredo Ortiz, individually and on behalf of all other similarly situated v. Summit Retail Solutions, Inc., Civil Action No. 6:18-cv-6784 (W.D.N.Y.) (MAT); and

WHEREAS, a similar case and collective action against defendant alleging violations of the Fair Labor Standards Act, as well as similar violations of New York Labor Law, is pending in the United States District Court for the District of Massachusetts, Joseph Modeski, et al., Individually and on Behalf of All Similarly Situated Employees, v. Summit Retail Solutions,

Inc., Civil Action No. 1:18-cv-12383 (D. Mass.) (FDS) and was originally filed on April 17, 2018; and

WHEREAS, Defendant Summit Retail Solutions, Inc. has recently filed a Motion to Dismiss, Stay or Transfer this action to the United States District Court for the District of Massachusetts alleging that this action should be dismissed or stayed under the “First Filed Rule” or transferred pursuant to a forum-selection clause or 28 U.S.C. § 1404(a) (Docket Item No. 10); and

WHEREAS, in return for plaintiffs’ consent to dismissal of this action without prejudice Defendant Summit Retail Solutions has agreed to permit Plaintiffs Dawn Smith and Wilfredo Ortiz to join or participate in the pending collective action, Joseph Modeski, et al., Individually and on Behalf of All Similarly Situated Employees, v. Summit Retail Solutions, Inc., Civil Action No. 18 cv 12383 (D. Mass.) (FDS) (“the Modeski Action”) and for purposes of any applicable statute of limitations apply the original state court filing date of October 9, 2018 to their individual claims set forth in Dawn Smith & Wilfred Ortiz Ruiz, v. Summit Retail Solutions, Inc. Index No. E2018008-080 (S.Ct. Monroe), provided that Plaintiffs Dawn Smith and Wilfredo Ortiz join the Modeski Action within ten (10) calendar days of the date of this Order; and

WHEREAS, no other persons have joined or opted into this action, no motion for class certification has been made, and no answer has been filed;

IT IS HEREBY ORDERED as follows:

1. Plaintiffs’ claims against Defendant Summit Retail Solutions, Inc. are dismissed in their entirety without prejudice, in accordance with Federal Rules of Civil Procedure 41(a)(2).

This dismissal is without costs, attorneys' fees, penalties, expenses or disbursements to any party as against another.

2. By consent of the parties, if Plaintiffs Dawn Smith and/or Wilfredo Ortiz choose to join or participate in the pending collective action, Joseph Modeski, et al., Individually and on Behalf of All Similarly Situated Employees, v. Summit Retail Solutions, Inc., Civil Action No. 1:18-cv12383 (D. Mass.) (FDS), within ten (10) calendar days of the date of this Order, then for purposes of any applicable statute of limitations the original state court filing date of October 9, 2018 of their complaint, Dawn Smith & Wilfred Ortiz Ruiz, v. Summit Retail Solutions, Inc. Index No, E2018008-080 (S.Ct. Monroe), shall apply to their individual claims against defendant.

Dated: March 4, 2019

/s/ Peter O'Brian Dellinger  
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Attorneys for Defendant Summit Retail Solutions

SO ORDERED

  
MICHAEL A. TELESKA  
United States District Judge

DATE 3/18/19